

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

8/27/03

UNITED STATES OF AMERICA

CASE NO: 8:03-Cr-77-T-30TBM

v.

SAMI AL-ARIAN  
\_\_\_\_\_ /

**DEFENDANT'S MOTION IN OPPOSITION TO GOVERNMENT'S  
MOTION FOR PROTECTIVE ORDER**

COMES NOW the Defendant, SAMI AL-ARIAN, by and through his undersigned counsel and files this motion in opposition to any designation of any material normally treated as Rule 16 discovery materials as classified and as grounds therefore would state:

1. At the outset of this case it was represented by the United States Attorney's Office and echoed by the Magistrate that *all* Rule 16 (*See* Federal Rules of Criminal Procedure) material would be declassified.<sup>1</sup> Since that moment, there has been a steady erosion in that position. The intermediate position was that the United States Attorney's Office would "seek" to have all Rule 16 material declassified. Now the most recent position is that some material, which is normally discoverable, should be or will be "classified".

2. To date, the Defendant has not been told *what* material is classified, if any, who classified it, when it was classified or, most importantly, what specific material is being discussed at the proposed pretrial conference.

3. In order to obviate the problems where one litigant does not know the classified material which is under discussion, section 5(a) of the Classified Information Procedures Act (hereinafter C.I.P.A.) makes it clear that the topics under discussion must be disclosed with sufficient specificity that a reasonable person would understand their importance. *See United States vs. Collins*, 720 F.2d 1195 (11<sup>th</sup> Cir. 1983). In *Collins*, it was the defendant who was

<sup>1</sup> This is a partial answer to the Court's query as to why counsel would take the representation of a Defendant knowing there would be classified materials involved.

required to make the disclosure to his opponent as to what classified material he was going to use in the course of his defense. Counsel for the Government protested an inability to address the materiality of the classified information embraced in the defendant's notice or alternative procedures to mitigate harmful disclosure absent a more specific notice.

4. In Collins the court held that "a sufficient notice is essential to put into motion the other C.I.P.A. procedures. The insufficiency of the notice fatally permeated those procedures which followed so that the district court's order upon them must be vacated and the case remanded". Collins, at 1198. Needless to say, the second prong of procedural due process is that the notice must be given at a time when it will permit a litigant to discuss the matter with his counsel and reach a reasoned position on the matter. Anything less than that would be to permit a game show process in which the defendant must guess as to the content of the material in question or come up with an on-the-spot college-bowl answer to his position on the matter.

5. Furthermore, the proposed order, as now written, suggests that defense counsel be permitted to view material which can never be discussed with the Defendant upon pain of prosecution. That alone creates an ethical conflict of enormous consequences. If a defendant wanted to testify to a matter which was contradicted by classified material, which ethical dictate should defense counsel follow? One dictate is to represent the defendant with "warm zeal", the other requires a lawyer to respect his nation's national security even if he believed that the material was improvidently classified. Thus, a conflict is created between a lawyer's duty to fight for his client and a lawyer's duty as a citizen. It is not unreasonable for a litigant whose entire future hangs in the balance to insist upon conflict-free counsel.

6. In the absence of a sufficient notice under 5(a) of C.I.P.A., no lawyer can begin to address this motion for a protective order without being entangled in a cornucopia of problems.

### ***RELIEF REQUESTED***

The undersigned is asking this Court to order the Government to follow section 5(a) of C.I.P.A and the holding and language of U.S. vs. Collins regarding the sufficiency of describing the evidence which the Government is seeking to deem "classified" and immune from Rule 16.

**MEMORANDUM OF LAW**

In United States vs. Collins, 720 F.2d 1195 (11<sup>th</sup> Cir. 1983), the issue was whether the defendant was entitled to keep defense material "classified" and thus afforded the protection of classified material pursuant to section 5(a) of C.I.P.A. Although the defendant provided what could be described as a fairly detailed notice of what they were deeming classified, and the Government had their own independent knowledge of the defendant's job and thus the type of material the defendant might be classifying, and the defendant supplemented a description of the classified material through an oral presentation at a hearing on the matter, the court still held that the notice, as given, was insufficient to put into motion the other C.I.P.A. procedures and protections.

Here, the shoe is on the other foot and it is the Government which is in possession of material they want to considered classified and C.I.P.A. protected. This court should be no less rigorous in requiring the Government to follow section 5(a) and specify *what* materials are being discussed and in requiring that the notice be given in sufficient time for the Defendant to form a reasoned judgment as what his position will be on those materials.

**WHEREFORE**, the Defendant respectfully requests this Honorable Court grant this motion and all other relief as required by law or equity.

Dated: 7/9/03

  
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Jeffrey G. Brown, Esquire

**CERTIFICATE OF SERVICE**


**I HEREBY CERTIFY** that the original of the foregoing has been furnished to the Clerk of Court, Middle District of Florida, located at the Sam Gibbons U.S. Courthouse, 801 N. Florida Ave., Suite 223, Tampa, FL 33602-4500, and that a true and correct copy has been furnished to the following interested persons:

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